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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

**TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER**

v.

MANUFACTURERS TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian,¹ prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 29) has not yet been reported.

¹ By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this petition the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 35). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED

Whether, in a proceeding by the Alien Property Custodian under Section 17 of the Trading with the Enemy Act to enforce a demand for a sum of money vested as the property of an enemy, the District Court may allow interest on such sum from the date of the demand.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 15-19.

STATEMENT

On January 30, 1947 the Alien Property Custodian, having previously vested the debt owing by the respondent to a named German enemy (Vesting Order No. 5791, February 1, 1946, 11 F. R. 3005), issued a turnover directive in which he found the amount of the debt to be \$25,581.49, and directed the respondent to turn over that amount (R. 11, 14). The respondent refused to comply, and on October 29, 1947, the Custodian

instituted the present proceeding under Section 17 of the Trading with the Enemy Act, 40 Stat. 425, 50 U. S. C. App. 17, to enforce compliance with the turnover directive (R. 4). On December 12, 1947, the District Court for the Southern District of New York (Coxe, J.) directed the respondent to pay over the sum demanded, together with interest at the rate of 6% from the date of service of the turnover directive (R. 23). The Court of Appeals for the Second Circuit affirmed the order of the District Court insofar as it directed compliance with the turnover directive, but a majority of the court (Swan and Frank, JJ.) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R. 34). The majority based its decision on the ground that "the Trading with the Enemy Act contains no provision for the payment of interest or any other penalty in the event of non-compliance with the Custodian's demand that enemy-owned property be turned over to him" and that there was "no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment" (R. 34). Judge Clark dissented on the ground that "since the defendant took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply" (R. 34).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals for the Second Circuit erred:

1. In holding that, when the Alien Property Custodian determined that a sum of money was owing to an enemy and demanded that such sum be paid over, a district court in which he brought suit to enforce his demand could not award interest at a reasonable rate from the date of the Custodian's demand;
2. In modifying the order of the District Court to strike out the award of interest.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals on the interest question is in conflict with the principles which this Court has established to govern the award of interest in the absence of express Congressional provision therefor.

As both courts below held, the respondent was obligated to pay over the sum demanded immediately upon receipt of the turnover directive (R. 23, 29). See also *Central Trust Co. v. Garvan*, 254 U. S. 554, 566, 558-9; *Commercial Trust Co. v. Miller*, 262 U. S. 51, 53, 55-6; *Silesian-American Corp. v. Clark*, 332 U. S. 469, 475-477. The respondent, therefore, unreasonably detained a sum of money which the Trading with the Enemy Act obligated him to pay forthwith upon the Custodian's demand.

The principal and perhaps the only ground of the majority opinion in the Court of Appeals appears to have been that the statute contains no express declaration of a congressional intent that the Custodian should recover interest as compensation for delay in compliance with this demand. But decisions of this Court, old and recent, have made it clear that little, if any, significance is to be given legislative silence in this respect. In numerous cases this Court and lower federal courts have awarded interest on obligations created by federal law, despite the absence of any statutory provision for such interest. Such interest has been awarded not as a penalty, but for the reasons on which Judge Clark based his dissent here: to indemnify the United States for the wrongful withholding of money which it was entitled to possess and use, and to avoid the unjust enrichment of the person who wrongfully retained and used the money. *E. g.*, *Billings v. United States*, 232 U. S. 261; *Royal Indemnity Co. v. United States*, 313 U. S. 289; *Maryland Casualty Co. v. United States*, 76 F. 2d 626 (C. C. A. 5). The principles followed by this Court were concisely stated in its recent opinion in *Rodgers v. United States*, 332 U. S. 371, 373:

* * * the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose

that the obligation shall not bear interest. * * * For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. * * *

As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. * * *

Thus, since a fine is imposed in a criminal case as a punishment or deterrent rather than for the financial advantage of the United States, criminal penalties do not bear interest. *Pierce v. United States*, 255 U. S. 398, 405-406. The *Rodgers* case, *supra*, applied this principle to penalties imposed on noncooperators under the Agricultural Adjustment Act. On the other hand, failure to pay a tax when due is held to entitle the United

States to interest. *E. g., Billings v. United States, supra.* Similarly, interest has been awarded in a suit to recover the amount of advance payments from the surety of a defaulting contractor, and in a suit to recover the value of lands with which the United States was induced to part through the defendant's fraud. *United States v. U. S. Fidelity Co.*, 236 U. S. 512; *Jones v. United States*, 258 U. S. 40.

If these standards are applied to the obligation to pay over money which the Custodian demands, pursuant to the Trading with the Enemy Act, it seems plain that the Government is equitably entitled to interest. The obligation to turn over such sums on demand is not, of course, imposed as a fine or penalty of any description. The statute creates the obligation, not only to keep the property from being used for the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; 55 Stat. 839, 50 U. S. C. App. 5 (b) (1). Indeed, the most recent amendment of the Act shows that this must be regarded as a major purpose of the statute, for it provides in substance that vested German and Japanese property shall not be returned to its former owners nor compensation paid to them, but that the net proceeds of such property shall be covered into the

Treasury. P. L. 896, 80th Cong., 2d Sess., July 3, 1948, § 12.² The obligation which the present suit was brought to enforce must, therefore, be regarded as one imposed for the "financial advantage" of the United States, within the rule stated in the *Rodgers* case.

The Court of Appeals sought to distinguish the *Billings* case and other cases cited above (*supra* p. 5) on the ground that they "involve taxes or advances where the right to the money was finally adjudicated" (R. 34). This distinction has no substance. In the tax cases³ as in this, Congress has decided that the public interest requires that the Government's receipt of money be not subject to the delay inherent in judicial proceedings—in other words, that the Government is entitled to possess and use the money in the period between its demand and final adjudication of the lawfulness of the exaction.⁴

² For lucid exposition of the considerations underlying this legislative policy, see Rubin, "*Inviolability*" of *Enemy Private Property* (1945) 11 *Law and Contemporary Problems* 166.

³ The right of the Government to collect its internal revenue by summary administrative proceedings has long been settled. *Phillips v. Commissioner*, 283 U. S. 589, 595. The Trading with the Enemy Act is, in fact, only one of a number of statutes which empower the Government to insist upon compliance with its orders prior to judicial review of their lawfulness. See *Yakus v. United States*, 321 U. S. 414, 442-3, and cases cited.

⁴ The Trading with the Enemy Act expressly provides that the Custodian may "seize" property which he determines to be owned by or owed to an enemy. 40 Stat. 418, as amended,

See *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-861 (S. D. N. Y.).

Thus, in the tax cases as in this, the possibility that the Government may, after full adjudication, be held not entitled to keep the sums collected can affect neither the Government's right to possess and use such sums in the interim period, nor its corollary right to be compensated for deprivation of that right. *Maryland Casualty Co. v. United States*, *supra*, is particularly apposite. There the Government brought an action on a bond to secure payment of a tax deficiency, the condition of the bond being the taxpayer's payment of the "deficiency in the tax found due by the Commissioner." The surety defended the suit on the ground that the tax was not legally owing and had, in fact, been determined in bankruptcy proceedings not to be owing. The court recognized that the taxpayer might "after paying seek refund of anything he did not owe" or that the surety might, after paying, be so subrogated to the taxpayer's rights as to be entitled to ask refund of any unlawful exaction. 76 F. 2d at p. 627. But the court treated the ultimate correctness of the Commissioner's determination as immaterial to the right

50 U. S. C. App. 7 (c). Courts have recognized that the Custodian could, if so inclined, take with the strong hand. See *Central Trust Co. v. Garvan*, 254 U. S. 554, 568-9; Hough J., concurring in *American Exchange National Bank v. Garvan*, 273 Fed. 43, 48 (C. C. A. 2), affirmed, 260 U. S. 706.

of the United States to interest as compensation for the unjust withholding of money which the United States was entitled at least temporarily to possess and use. "The object of the bond was to assure prompt payment * * * of the taxes claimed by the Commissioner; not then to start a lawsuit about them." *Ibid.* The court assessed interest against the surety, at the legal rate, from the date of notice and demand upon it. There is no reason to suppose that the result would have been different if the taxpayer had not, by posting bond, transferred his responsibility to the surety, for the taxpayer's statutory obligation to pay would have been quite as absolute as the surety's contractual obligation.

2. The precise question has arisen in but one other Circuit. In *Clark v. E. J. Lavino & Co.*, the District Court for the Eastern District of Pennsylvania, in circumstances substantially similar to those of the present case, awarded interest to the Government in its original order but on rehearing entered a decree which allowed no interest. The original opinion of the court (72 F. Supp. 497) did not discuss the question of interest, and the court filed no opinion in connection with its decree on rehearing. The Government has taken an appeal to the Court of Appeals for the Third Circuit, but the case has not yet been calendared for argument.²

² In *Clark v. Central Savings Bank* (S. D. N. Y., Civil No. 43-753, unreported) a proceeding substantially similar to

3. The decision of the Court of Appeals will substantially hamper the exercise by the Custodian of the powers which Congress has conferred on him.

As in the tax procedure, a principal purpose of the summary procedure which Congress has authorized to be employed in the "swift, certain and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest" is the prevention of recalcitrance and litigation designed simply to postpone as long as possible the loss of the use of such property. Consequently, judicial enforcement, under Section 17 of the Act, of the Custodian's demand should, as Mr. Justice Holmes declared, be not "less immediately effective than a taking with the strong hand." *Central Trust Co. v. Garvan*, 254 U. S. 554, 568. In practice it can be so effective only if delay in compliance is rendered unprofitable by the award of interest. The statement by the court below that the Custodian can, under Section 17, obtain an order directing compliance "without delay" (R. 34) is not accurate. In the instant case some seven weeks elapsed between the filing of the

the present one, the District Court, in an order enforcing the Custodian's directive, entered on December 19, 1947, failed to award interest. The court wrote no opinion. The Government filed notice of appeal, but prosecution of the appeal has been postponed pending the outcome of the instant case.

* Judge Learned Hand in *Kahn v. Garvan*, 263 Fed. 909, 916-7 (S. D. N. Y.).

Custodian's petition and the entry of the District Court's order. The generally crowded state of federal dockets makes it doubtful whether this time could be much shortened in other jurisdictions. In fact, in the *Lavino* case, *supra* p. 10, 8½ months elapsed between the filing of the Custodian's petition and the first order of the District Court. Moreover, the administrative burden of the Custodian is greatly increased if he must litigate every demand for possession. In brief, the purpose of Congress to preclude dilatory tactics on the part of holders of enemy property can be fully effectuated only if such tactics are made unprofitable; and they are not unprofitable if the recalcitrant is not required to pay a fair rate of interest for the period during which, without legal right, he detains the property. Congress assuredly did not create the summary procedure for obtaining property with the intention that flouting of that procedure should result in the enrichment (through use of the property involved) of the person flouting it. See *Central Trust Co. v. Garvan*, 254 U. S. 554, 568-9.

4. The question is of large practical importance in the administration of the Trading with the Enemy Act.

Turnover directives have been and are being issued by the Office of Alien Property with increasing frequency, particularly in connection with its program for vesting cash, including bank deposits and other indebtednesses to enemies.

See *Annual Report, Office of Alien Property, Department of Justice, Fiscal Year ending June 30, 1947*, p. 96. They may involve sums of money far greater than that here concerned. For example, one such directive, recently issued, involved a sum in excess of half a million dollars; another, which has not yet been complied with, approximately \$150,000. The great majority of holders of enemy property who have received such directives have complied promptly, but a severe strain is placed upon the will to cooperate in the Government's program if the reward of non-cooperation is the interest-free use of a substantial sum of money for a period of several weeks or months, while the Custodian is obtaining judicial enforcement of his order. It is not as if such litigation could serve any useful purpose. The Custodian's suit under Section 17 is purely possessory, and settles nothing as to the correctness of his determination and his ultimate right to retain the property; any such question must in any event be litigated in a separate proceeding under Section 9 of the Act. See, *e. g.*, *Central Trust Co. v. Garvan*, *supra*, at pp. 566, 568-9; *Kahn v. Garvan*, 263 Fed. 909, 914, 916-7 (S. D. N. Y.). But the tendency of the decision of the court below, if allowed to stand, will inevitably be to encourage this fruitless litigation and thereby to increase the administrative burden of the Custodian; to entangle in incidental litigations the Custodian's exercise of his power sum-

marily to reduce enemy property to possession; and to deprive the Government of the possession and benefit of substantial sums of money for substantial periods of time.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-31):

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or in-

terest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or

the same may be seized by the Alien Property Custodian; * * *

* * *

SEC. 9. (a) [as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511] That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the

claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may

be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"

* * * * *

SEC. 39 (as added by Pub. L. No. 896, 80th Cong., 2d Sess., July 3, 1948):

No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.